(1)

Supreme Court, U.S.
FILED

No. 09-1406 MAY 17 2010

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IN THE

Supreme Court of the United States

David Boylen Manley,

Petitioner

v.

Brian Belleque, Superintendent, Oregon State Penitentiary,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This case arises from the Court of Appeals' reversal of the District Court's grant of a writ of *habeas corpus* to David Boylen Manley regarding his 1994 convictions out of Lane County, Oregon. The Court of Appeals ruled that the District Court erred in concluding that the state court's denial of post-conviction relief was an unreasonable application of federal law. The Court of Appeals also decided against Mr. Manley on an issue that had been raised by Mr. Manley, but not resolved by the District Court, specifically, whether his trial counsel was constitutionally ineffective for advising him to plead guilty when he had at all times maintained his innocence to the charges. Accordingly, Mr. Manley raises the following question:

Whether it is constitutionally ineffective for a defense counsel to advise a purportedly innocent defendant to plead guilty absent disclosure to the court of the defendant's purported innocence.

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OPINIONS BELOW

The decision of the District Court granting Mr. Manley's Petition for Writ of *Habeas Corpus* is set forth at App. B at 6a. The memorandum opinion of the Ninth Circuit Court of Appeals reversing the District Court is set forth at App. A at 1a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The Ninth Circuit Court of Appeals entered the judgment reversing the decision of the United States District Court on February 16, 2010.

STATUTORY PROVISIONS

28 U.S.C. § 2254 provides:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
> (b)
> (1) An application for a writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State

court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of *habeas corpus* may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on

the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of *habeas corpus* by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered

through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy

> of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.
> (h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.
> (i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which

> district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment, Section One to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

FACTS MATERIAL TO THE QUESTION PRESENTED

Mr. Manley's charges were based upon the allegations of his then wife that he assaulted and raped her, among other things, on two different

occasions in March 1997 and November 1997. App. C at 13a. The 15 count indictment was issued in Lane County, Oregon Circuit Court on November 26, 1997. *Id.*

The record reflects that Mr. Manley's defense counsel first made contact with the Deputy District Attorney in charge of the case regarding a plea offer, "maybe a week or so before the trial setting." App. E at 30a.

On the morning of Friday, June 12, 1998, the date set for Mr. Manley's criminal call appearance, counsel visited Mr. Manley at the Lane County Jail. App. E at 30a. Trial was scheduled for the next Tuesday, June 16, 1998. As of the morning of Friday, June 12, 1998, Mr. Manley believed he would be going to trial the following Tuesday. App. E at 34a. Mr. Manley had maintained his innocence throughout the case and continued to maintain his innocence at the time of the meeting. App. E at 32a.

Although there was dispute about the timing of the agreement, Mr. Manley ultimately agreed to plead guilty to eleven of the fifteen counts and undergo an "open sentencing." App. E at 31a. However, Mr. Manley asked his lawyer whether it was appropriate for him to plead guilty to crimes he maintained he had not committed App. E at 31a. Counsel advised him that it would be much better to do a "straight up guilty plea" because (1) the prosecutor had refused to allow an *Alford* plea; and (2) counsel thought that the court would be more lenient at sentencing if Mr. Manley were to plead "straight up." App. E at 31a. That same day, Mr. Manley pled guilty and affirmed that he was in fact "guilty" to each of the charges.

Shortly after pleading guilty, Mr. Manley moved to withdraw his guilty pleas. App. D at 24a. After an evidentiary hearing at which defense counsel testified, the court denied the motion. App. D at 25a. Mr. Manley was ultimately sentenced to 476 months imprisonment. App. D at 25a.

Mr. Manley filed a petition for post-conviction relief in the Umatilla County Oregon Circuit Court. The Court denied the petition on January 6, 2004 and issued findings of fact. App. D at 19a. After exhausting his appeals, Mr. Manley filed a petition in the United States District Court for the District of Oregon pursuant to 28 U.S.C. §2254. The habeas petition was ultimately granted. App. B at 6a.

SUMMARY OF ARGUMENT

Defense counsel provided constitutionally ineffective assistance of counsel by advising Mr. Manley to do a "straight up guilty plea" when Mr. Manley had at all times maintained his innocence. Counsel's advice regarding the "straight up guilty plea" put Mr. Manley in the impossible position of having to admit to crimes at the plea hearing and then back away from them at sentencing, thereby losing any possible chance of leniency that he might have obtained by pleading guilty.

In addition, defense counsel's advice to Mr. Manley to not disclose his purported innocence to the Court made it impossible for the Court to adequately assess the voluntary nature of the Mr. Manley's plea as well as the factual basis. Shortly thereafter, Mr. Manley moved to withdraw his plea.

The Court of Appeals erred in concluding that an attorney's advice to his client to "plead straight up" to a criminal charge, even though his client steadfastly maintained his innocence, could be reasonable advice under any circumstances, absent disclosure of the purported innocence to the Court. In the instant case, the advice was disastrous for Mr. Manley.

ARGUMENT

The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial. *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel."). Ineffective assistance of counsel claims are analyzed under the framework set out by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984).

In *Strickland*, the Supreme Court held that "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 687-88, and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Thus, Strickland established a two-pronged test for ineffective assistance of counsel claims based on a "reasonable probability" standard.

In *Brady v. United States*, 397 U.S. 742, 746 (1970), the Court said.

> That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so -- hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial -- a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

In *Hill v. Lockhart*, 474 U.S. 52, 55 (1985) the Court noted: "The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." (Citations omitted) However, the Court held that under the *Strickland* standard, a habeas petitioner also "must show that there is a reasonable

probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 57.

In 1970, this Court recognized the authority of trial courts to accept guilty pleas from defendants who simultaneously deny culpability. In *North Carolina v. Alford*, 400 U.S. 25, 38 (1970), this Court held that a trial court did not commit constitutional error by accepting a guilty plea, despite the defendant's claim of innocence, where "a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." Alford was charged with the capital crime of Murder in the First Degree. At the time, North Carolina law provided for a sentence of between two and thirty years for second degree murder. Given the strength of the state's case, Alford's attorney advised him to plead guilty to second degree murder in order to avoid the death penalty and limit the potential sentence to 30-years. The prosecutor agreed to accept the plea. Before the plea was finally accepted by the trial court, the court heard the sworn testimony of a police officer who summarized the State's case. Two other witnesses besides Alford were also heard. *Id.* at 28.

In the present case, Mr. Manley, like Mr. Alford maintained his innocence throughout. Likewise, defense counsel recommended that Mr. Manley plead guilty. According to counsel, Mr. Manley agreed to the plea agreement primarily because he hoped that the Court would agree to a lower end sentence and that the complainant, his ex-wife, might not request the maximum sentence. The

difference, however, is that Mr. Manley's attorney advised him to do a "straight up guilty plea" – that is, he advised against informing the Court that Mr. Manley maintained his innocence (now referred to as an "*Alford* Plea").

Again, it was trial counsel's feeling that the Court would look more favorably upon a "straight up guilty plea" than an *Alford* plea and therefore would likely be more lenient in sentencing. App. F at 37a. Trial counsel did not raise a concern about the apparent misrepresentation that this would require during the plea and sentencing hearings. He testified at his deposition that it was "simply a part of the plea bargaining process." App. G at 40a.

By advising Mr. Manley to do a "straight up guilty plea" despite his claim of innocence, counsel completely ignored his fundamental role in the plea negotiation process and subverted the court's role. When a defendant is called upon to waive fundamental constitutional rights, such as with a guilty plea, counsel's core function is not simply to obtain what he believes is the best result for his client. Rather, as the court recognized in *Strickland*, "counsel's core functions include informing the defendant, in a manner and to the extent appropriate to the circumstances to as to assure that the defendant makes such choices intelligently." 466 U.S. 668, 688.

The Court of Appeals held that Mr. Manley's "only two options were to plead guilty or to go trial" and that because there was a possibility for leniency if Mr. Manley pled guilty, it was entirely reasonably to advise such a plea. App. A at 4a. To the contrary, there were not two options, there was one option: to

be candid with the Court about Mr. Manley's claim of innocence. Indeed, when a defendant pleads guilty but simultaneously denies culpability, the court should "take special care to make certain that there is a factual basis for the plea." ABA Standards of Criminal Justice, 14-1.6(b).

Absent the disclosure to and approval of the court (e.g. via an *Alford* plea), it is utterly unreasonable for an attorney to advise a defendant who has continually maintained his innocence to plead guilty even for the purpose of gaining leniency from the court. This is especially true when the plea agreement contemplates an "open sentencing." Such advice ignores the likelihood that defendant will be called upon to relate the specific conduct to which he plead guilty; if not at the plea hearing, certainly at the sentencing.

The results for Mr. Manley were disastrous. Counsel's "straight up guilty plea" advice placed him in the position of having to admit to crimes at the plea hearing, then having to back away from those admissions at sentencing, thereby losing any benefit that he might have obtained from accepting responsibility.

Mr. Manley, having recognized the problem created by his lawyer, sought to withdraw the plea. Unfortunately for Mr. Manley, the judge who sentenced him was the same judge that heard the motion to withdraw the plea and it was clear from the outset that the judge held a dim view of Mr. Manley.

REASONS FOR GRANTING CERTIORARI

The Court of Appeals holding that it is not only acceptable, but reasonable for defense counsel to advise a purportedly innocent client to plead guilty, has so far departed from the accepted and usual course of judicial proceedings and sanctioned that departure by the state court.

In addition, the question of whether it is acceptable and reasonable to give such advice to a purportedly innocent client has not yet been addressed by this Court and is an important question of federal law.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

May 14, 2010

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-36011
D.C. No. 3:07-cv-00009-JE

DAVID BOYLEN MANLEY, Petitioner – Appellee,
v.
BRIAN BELLEQUE, Superintendent, Oregon State Penitentiary, Respondent - Appellant.

[Filed February 16, 2010]

MEMORANDUM*
(*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.)

Appeal from the United States District Court
for the District of Oregon
Ancer L. Haggerty, Senior District Judge, Presiding
Argued and Submitted February 2, 2010
Seattle, Washington

Before: RYMER, GOULD and BYBEE, Circuit Judges.

The State appeals the district court's grant of a petition for a writ of habeas corpus to David

Boylen Manley. Because the state court's resolution of Manley's claims was not an unreasonable application of clearly established federal law, we reverse the judgment of the district court.[1] Manley presents three claims on appeal.[2]

1. Manley's first claim is that his plea counsel provided ineffective assistance of counsel because he failed to warn Manley that the State would seek a hearing in aggravation and the maximum sentence (through consecutive and departure sentences). We are unpersuaded.

Plea counsel informed Manley of the maximum possible sentence if he went to trial (around fifty years) and if he pleaded guilty (around thirty-five years). Counsel told Manley that the State could seek consecutive sentences and departure sentences.[3] The two discussed the "sentencing consequences," including the worst case scenario and the best case scenario. It is true that counsel did not tell Manley that the State would

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[1] See 28 U.S.C. § 2254(d)(1)-(2). State court findings of fact are presumed correct unless rebutted by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1). We consider Manley's arguments in light of these standards.

[2] In light of the State's admission at oral argument that in this case there is not a meaningful difference between departure sentences and consecutive sentences, we conclude that Manley has properly exhausted his claims.

[3] While we recognize that there are slight inconsistencies in the record concerning whether counsel advised Manley about the possibility of departure sentences, we defer to the state post-conviction court's reasonable factual finding that counsel was credible when counsel testified in his post-conviction affidavit and in his post-conviction deposition that he advised Manley of the potential for departure sentences. See *Wood v. Allen*, --- U.S. ---, No. 08-9156, 2010 WL 173369, at *6-7 (Jan. 20,2010).

seek a hearing in aggravation or that the State would seek the maximum sentence, but these omissions did not render counsel's performance ineffective.

When counseling a guilty plea, "it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement." *Libretti v. United States*, 516 U.S. 29, 50 (1995). At the same time, "[w]aiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken." *McMann v. Richardson*, 397 U.S. 759, 770 (1970). As an initial matter, nothing in the record suggests that Manley's counsel knew that the State would seek a hearing in aggravation. Nor is there evidence that counsel knew that the State would seek the maximum sentence. This is reason enough to reject Manley's argument. We do not see how Manley's counsel could be expected to tell Manley something of which counsel himself was not aware. At the time, Manley's counsel faced a difficult situation. Manley was not a sympathetic defendant. Significant evidence (including the testimony of the victim, Manley's wife) portrayed him as an abusive husband who had, among other things, raped his wife in front of his children. Counsel's decision, in the face of two less-than-ideal options, to highlight Manley's prospects for leniency did not make his representation ineffective. At the very least, it was not unreasonable for the state court to so hold. 28 U.S.C. § 2254(d)(1); see *Williams v. Taylor*, 529 U.S. 362, 407 (2000).

Viewed more charitably, Manley's claim is that his counsel should have placed greater emphasis on the possibility that the State would seek a hearing in aggravation and the maximum sentence. We disagree. In hindsight, counsel undoubtedly could have done some things differently. But in reviewing counsel's representation, we must make "every effort ... to eliminate the distorting effects of hindsight ... and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

2. Manley's second claim is that his plea counsel was ineffective for advising Manley to do a "straight up guilty plea" even though Manley had always maintained his innocence. Once again, we disagree. Manley's guilty plea undermines his argument that he had always maintained his innocence. As part of pleading guilty, Manley told the judge in open court that he did, in fact, commit the crimes with which he was charged. As a general matter, "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

Moreover, it is not entirely clear what more Manley wanted his counsel to do in this respect. Manley's counsel could not have recommended that Manley offer an *Alford* plea because the State would not agree to a plea bargain if Manley insisted on entering an *Alford* plea.[1] As a result, Manley's only two options were to plead guilty or to go to trial.

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[1] An *Alford* plea is a guilty plea accompanied by the defendant's claim of innocence. *Edwards v. Carpenter*, 529 U.S. 446, 448 (2000) (citing *North Carolina v. Alford*, 400 U.S. 25 (1970)).

Manley's counsel told Manley that he believed that Manley faced greater exposure if he went to trial, and that there was a possibility for leniency if he pleaded guilty. *Cf* 1 ABA STANDARDS OF CRIMINAL JUSTICE 14-3.2 (3d ed. 1999) ("[D]efense counsel ... should advise the defendant of the alternatives available .... "). If Manley wished to continue to maintain his innocence, he was free to refuse the State's offer. Nothing in counsel's advice rendered Manley's guilty plea unknowing or involuntary. Because we conclude that plea counsel's performance "f]ell] within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, we need not address the question of prejudice.

3. Manley's last claim is that his sentencing counsel was ineffective for failing to move for recusal of the sentencing judge. We disagree. The record supports the state post-conviction court's determination that "[s]entencing counsel had no basis to file a motion to recuse the sentencing court," and that the sentencing court "afforded petitioner a fair and impartial hearing."

REVERSED

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 07-0009-JE

DAVID BOYLEN MANLEY, Petitioner,
v.
BRIAN BELLEQUE, Respondent.

[Filed November 4, 2008]

JUDGMENT

Based upon the record, and the Order filed November 4, 2008,
IT IS HEREBY ORDERED AND ADJUDGED that the Findings and Recommendation [54] is not adopted and David Boylen Manley's Petition for Writ of Habeas Corpus [1] is GRANTED.

DATED this 4th day of November, 2008.

/s/ ANCER L. HAGGERTY
ANCER L. HAGGERTY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 07-0009-JE

DAVID BOYLEN MANLEY, Petitioner,
v.
BRIAN BELLEQUE, Respondent.

[Filed November 4, 2008]

ORDER

HAGGERTY, Chief Judge:

Magistrate Judge Jelderks referred to this court a Findings and Recommendation [54] in this matter. Judge Jelderks recommends that petitioner David Boylen Manley's Petition for Writ of Habeas Corpus [1] be denied and dismissed with prejudice. Petitioner flied timely objections, and respondent Brian Belleque filed timely responses. For the following reasons, this court declines to adopt the Findings and Recommendation.

STANDARDS

When a party objects to any portion of a Findings and Recommendation, the district court must conduct a *de novo review*. 28 U.S.C. § 636 (b)(1)(B); *McDonnell Douglas corp. v. Commodore Bus. Mach. Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981).

The court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(l).

BACKGROUND

The Findings and Recommendation contains a factual summary outlining the history of this matter, and the facts will not be fully repeated here. On June 18, 1998, petitioner, represented by his third attorney (plea counsel), "pled guilty with 'open' sentencing to Criminal Mischief, Unauthorized Use of a Motor Vehicle, Burglary, Sexual Abuse, Rape, and two counts each of Assault, Coercion, and Sodomy in the First Degree." Findings and Recommendation at 3. The State of Oregon (State) sought departure sentences and a "hearing in aggravation." *Id.* at 6. On August 13, 1998, the day before petitioner's scheduled sentencing hearing, petitioner represented by his fourth attorney, filed a motion to withdraw his guilty pleas. *Id.* at 3. Petitioner was sentenced on September 25, 1998, and received consecutive sentences with upward departures totaling 476 months in prison. *Id.* On January 3, 2007 petitioner filed a Petition for Writ of Habeas Corpus pursuant to 2S U.S.C. § 2254.

DISCUSSION

The Findings and Recommendation found that petitioner did not exhaust his claim that trial counsel failed to advise him of the consequences of his guilty pleas and of the possibility that the State would be seeking departure sentences and a "hearing in aggravation." Petitioner objects to this finding.

In petitioner's Second Amended Post Conviction Relief (PCR) Petition, he raised a claim that "counsel did not adequately advise petitioner that the state could present evidence at sentencing to show aggravation." Findings and Recommendation at 6. In his appeal of the PCR court's decision to the Oregon Court of Appeals, petitioner raised a claim that "[t]rial counsel did not adequately advise petitioner of the consequences of his guilty pleas and the intent of the prosecutor to seek the maximum sentence." Respondent's Ex. 139 at 23. Petitioner further argued that "counsel never told petitioner that the state would seek the maximum sentence," and that the petitioner was never advised "that the state would be seeking consecutive sentences." *Id.* at 24. Although, petitioner used phrases other than "departure sentences" or "hearing in aggravation," this court finds that petitioner properly raised this claim before the Oregon Court of Appeals and subsequently raised the claim to the Oregon Supreme Court. Respondent's Ex. 141 at 9-10. Petitioner's arguments were sufficient to exhaust this claim; to find otherwise elevates form over substance. Petitioner's claim is now considered on the merits by this court.

Plea counsel was questioned twice regarding whether he had advised petitioner of the possibility that the State might seek departure sentences or a hearing in aggravation. On August 18, 1998, plea counsel testified in Lane County Circuit Court as follows: "I don't know that I specifically discussed an upward departure on that, given the fact that his exposure on the Measure 11s [sic] that they ran consecutively was so extreme." Respondent's Ex. 109

at 14. On January 17, 2003, plea counsel testified in a deposition that he and petitioner: "talked about the potentials for departures. I don't know if we specifically talked about numbers in terms of what they could do... I don't think we talked specifically about numbers, how much time beyond what I had originally estimated his maximum would be." Respondent's Ex. 131 at 40.

Given the testimony of plea counsel, this court cannot conclude that petitioner was advised of the potential for departure sentences and the possibility that the State would seek a hearing in aggravation. Accordingly, this court must consider whether plea counsel's errors rendered petitioner's plea involuntary.

When a petitioner "complains of the ineffectiveness of counsel's assistance, the [petitioner] must show that counsel's representation fell below an objective standard of reasonableness." *Strickland V. Washington*, 466 U.S. 668, 687-88 (1984). The reasonableness of counsel's performance is judged based on the facts of the particular case as they were known at the time of counsel's conduct. *Bell v. Cone*, 535 U.S. 685, 698 (2002). To prove a deficient performance of counsel, a petitioner must demonstrate that his or her attorney "made errors that a reasonably competent attorney acting as a diligent and conscientious advocate would not have made." *Butcher v. Marquez*, 758 F.2d 373, 376 (9th Cir. 1985); *see also Tinsley v. Borg*, 895 F.2d 520 (9th Cir. 1990) (citing *Strickland*).

The petitioner must demonstrate not only that the particular errors made by counsel were unreasonable, but that petitioner was in fact

prejudiced by those errors. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (citing *Strickland*, 466 U.S. at 693). In order to satisfy the "'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

Here, petitioner asserts that had he been advised of the State's intent to seek departure sentences, he would not have pled guilty. Plea counsel's errors were objectively unreasonable.

Plea counsel should have advised petitioner of the possibility that the State might seek upward departures, and that under "open" sentencing, the sentencing judge could sentence petitioner to a period of incarceration in excess of what petitioner and his attorney had discussed as his likely maximum.

This court need not engage in guesswork and speculation as to whether petitioner would have insisted on going to trial had he been adequately advised by counsel of the consequences of his guilty pleas. As noted above, before his sentencing occurred, petitioner undertook explicit efforts to withdraw his guilty pleas. A plea cannot support a judgment of guilt unless it was voluntary in the constitutional sense. *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976). This court concludes that petitioner's guilty pleas cannot be construed as voluntary.[1]

---

[1] Petitioner has additional objections to the Findings and recommendation. Because this court is granting petitioner's Petition for Writ of Habeas Corpus, this court need not analyze petition's additional objections.

For the reasons provided herein, the Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 is granted as follows: the court issues this Writ of Habeas Corpus vacating petitioner's convictions and sentence in this case. Respondent shall either try petitioner or release him from custody within 180 days. Prior to trial, petitioner shall have the opportunity to plead guilty to the crimes with which he is charged and be re-sentenced. If respondent chooses to appeal this decision to the United States Court of Appeals for the Ninth Circuit, respondent may move pursuant to Federal Rule of Civil Procedure 62(c) for a stay pending appeal. *See Hilton v. Braunskill*, 481 U.S. 770, 776-79 (1987).

CONCLUSION

For the foregoing reasons, the court declines to adopt the Findings and Recommendation [54]. David Boylen Manley's Petition for Writ of Habeas Corpus [1] is GRANTED.

IT IS SO ORDERED.

DATED this 4th day of November, 2008.

/s/ ANCER L. HAGGERTY
ANCER L. HAGGERTY
United States District Judge

Appendix C

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

No. 10-97-11098

STATE OF OREGON, Plaintiff,
v.
DAVID BOYLEN MANLEY, Defendant.

[Filed November 26, 1997]

INDICTMENT

The above named defendant is accused by the Lane County Grand Jury of the crimes of

COERCION
CRIMINAL MISCHIEF IN THE SECOND DEGREE
UNAUTHORIZED USE OF MOTOR VEHICLE
BURGLARY IN THE FIRST DEGREE
SEXUAL ABUSE IN THE FIRST DEGREE
ASSAULT IN THE FOURTH DEGREE
RAPE IN THE FIRST DEGREE
SODOMY IN THE FIRST DEGREE
SODOMY IN THE FIRST DEGREE
COERCION
COERCION
COERCION
SODOMY IN THE FIRST DEGREE

SODOMY IN THE FIRST DEGREE
ASSAULT IN THE FOURTH DEGREE

committed as follows:

COUNT 1

The defendant on or about November 18, 1997, in the county aforesaid, did unlawfully and knowingly compel Kerrye Manley to abstain from engaging in conduct in which Kerrye Manley had a legal right to engage, by means of instilling in Kerrye Manley a fear that if she engaged in the conduct contrary to the compulsion, the defendant would unlawfully cause physical injury to Kerrye Manley; contrary to statute and against the peace and dignity of the State of Oregon;

COUNT 2

The defendant on or about November 19, 1997, in the county aforesaid. did unlawfully and intentionally damage clothing, by pouring bleach on and urinating on clothing, the property of Kerrye Manley, the defendant having no right to do so nor reasonable ground to believe that he had such right; contrary to statute and against the peace and dignity of the State of Oregon;

COUNT 3

The defendant on or about November 19, 1997, in the county aforesaid, did unlawfully and knowingly take and operate a vehicle, a 1988 Ford Taurus, without the consent of the owner, Kerrye Manley; contrary to statute and against the peace and dignity of the State of Oregon;

The State further alleges that the property stolen was a vehicle used primarily for personal rather than commercial transportation;

COUNT 4

The defendant on or about November 19, 1997, in the county aforesaid, did unlawfully and knowingly enter or remain in a dwelling located at 3820 E. 15th Avenue, Eugene, Lane County, Oregon, with the intent to commit the crime of harassment, menacing, coercion, or assault therein; contrary to statute and against the peace and dignity of the State of Oregon;

The State further alleges that the above-described crime occurred in an occupied dwelling;

The State further alleges that during the commission of the above-described crime, defendant caused or threatened physical injury to Kerrye Manley;

COUNT 5

The defendant on or about November 19, 1997, in the county aforesaid, did unlawfully subject Kerrye Manley to sexual contact by means of forcible compulsion; contrary to statute and against the peace and dignity of the State of Oregon;

COUNT 6

The defendant on or about November 19, 1997, in the county aforesaid, did unlawfully and knowingly cause physical injury to Kerrye Manley; contrary to statute and against the peace and dignity of the State of Oregon;

COUNT 7

The defendant on or about November 19, 1997, in the county aforesaid, did unlawfully and knowingly

engage in sexual intercourse with Kerrye Manley, by means of forcible compulsion; contrary- to statute and against the peace and dignity of the State of Oregon;

COUNT 8

The defendant on or about November 19, 1997, in the county aforesaid, did unlawfully and knowingly engage in deviate sexual intercourse with Kerrye Manley, by means of forcible compulsion; contrary to statute and against the peace and dignity of the State of Oregon;

COUNT 9

The defendant on or about November 19, 1997, in the county aforesaid, in an act separate and distinct from that alleged in Count 8, did unlawfully and knowingly engage in deviate sexual intercourse with Kerrye Manley, by means of forcible compulsion; contrary to statute and against the peace and dignity of the State of Oregon;

COUNT 10

The defendant on or about November 19, 1997, in the county aforesaid, did unlawfully and knowingly compel Kerrye Manley to engage in conduct from which Kerrye Manley had a legal right to abstain, by means of instilling in Kerrye Manley a fear that if she refrained from the conduct compelled, the defendant would unlawfully cause physical injury to Kerrye Manley; contrary to statute and against the peace and dignity of the State of Oregon;

COUNT 11

The defendant on or between March 15, 1997, and April 1, 1997, in the county aforesaid, did unlawfully and knowingly compel Kerrye Manley to engage in conduct from which Kerrye Manley had a legal right

to abstain, by means of instilling in Kerrye Manley a fear that if she refrained from the conduct compelled, the defendant would unlawfully cause physical injury to Kerrye Manley; contrary to statute and against the peace and dignity of the State of Oregon;

COUNT 12

The defendant on or between March 15, 1997, and April 1, 1997, in the county aforesaid, in an act separate and distinct from that alleged in Count 1, did unlawfully and knowingly compel Kerrye Manley to engage in conduct from which Kerrye Manley had a legal right to abstain, by means of instilling in Kerrye Manley a fear that if she refrained from the conduct compelled, the defendant would unlawfully cause physical injury to Kerrye Manley; contrary to statute and against the peace and dignity of the State of Oregon;

COUNT 13

The defendant on or between March 15, 1997, and April 1, 1997, did unlawfully arid knowingly engage in deviate sexual intercourse with Kerrye Manley, by means of forcible compulsion; contrary to statute and against the peace and dignity of the State of Oregon;

COUNT 14

The defendant on or between March 15, 1997, and April 1, 1997, in the county aforesaid, in an act separate and distinct from that alleged in Count 13, did unlawfully and knowingly engage in deviate sexual intercourse with Kerrye Manley, by means of forcible compulsion; contrary to statute and against the peace and dignity of the State of Oregon;

COUNT 15

The defendant on or about April 2, 1997, in the country aforesaid, did unlawfully and knowingly cause physical injury to Kerry Manley; contrary to statute and against the peace and dignity of the State of Oregon.

Dated this 26th day of November, 1997, at Eugene, Lane County; Oregon.

F. DOUGLASS HARCLEROAD, District Attorney

By /s/ Caren L. Tracy
Caren L. Tracy, Deputy 83408
Lane County Courthouse
Eugene, OR 97401 (503) 687-4261

A TRUE BILL

/s/ David S. Brewer
David S. Brewer
Foreperson of the Grand Jury

Appendix D

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF UMATILLA

No. CV02-1097

DAVID BOYLEN MANLEY, Petitioner,
v.
JEAN HILL, Superintendent, Eastern Oregon Correctional Institution, Defendant.

[Filed January 6, 2004]

FINDINGS OF FACT, CONCLUSIONS OF LAW

This matter came before the court and the Honorable Jeff M. Wallace for trial on petitioner's Second Amended Petition for Post-Conviction Relief. Petitioner appeared in person and by his attorney, Samuel Kauffman, and defendant appeared by and through her attorney, Susan G. Howe, Assistant Attorney General.

In this proceeding, petitioner contends that his conviction in Lane County Case No. 10-97-11098 is void and the subsequent sentence invalid in that the conviction was obtained in violation of his constitutional rights.

Specifically, petitioner claims that:

First Claim for Relief (plea Hearing)

A. Petitioner's convictions are illegal because the underlying criminal proceedings resulted in a substantial denial of petitioner's rights under ORS 138.530, and he was denied due process of law and the effective and adequate assistance of trial counsel under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and under Article I, section 11 of the Oregon Constitution as follows:

1. Petitioner was denied the effective and adequate assistance of counsel during critical phases of his plea hearing in violation of his right to counsel and right to due process guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, section 11 of the Oregon Constitution as follows:

a. Trial counsel was absent during the trial court's group advice of rights;

b. Trial counsel failed to object to the trial court's group advice of rights, which the trial court conducted without the presence of petitioner's counsel;

c. Trial counsel advised the trial court that petitioner understood his rights, even though he was not present at the trial court's group advice of rights and did not consult with petitioner or inquire of petitioner whether he understood his rights prior to the entry of the guilty pleas.

~~2. Petitioner was denied due process of law and the effective and adequate assistant of trial counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and under Article I, section 11 of the Oregon Constitution for the following reasons:~~

a. Upon petitioner's information and belief, counsel who represented petitioner at his plea hearing failed to adequately investigate and explore possible defenses to the charges and impeachment evidence, including but not limited to:

(1) The complainant's bias against petitioner and her motive to testify falsely;

(2) The complainant's prior false allegations of abuse against petitioner. (dismissed by petitioner)

b. Upon petitioner's information and belief, the attorney that represented petitioner at his plea hearing failed to adequately advise petitioner of the consequences of his plea and to ensure that petitioner's pleas were knowing and voluntary, as follows:

(1) Trial counsel did not request adequate time for petitioner to fully consider the consequences of his guilty plea and to consult with his attorney;

(2) Trial counsel did not advise petitioner of the maximum possible sentence, including the maximum possible consecutive sentence that could be imposed by the Court;

(3) Trial counsel did not adequately advise petitioner that the Court could conduct a presentence investigation or sexual offender evaluation;

(4) Trial counsel did not adequately advise petitioner that the state could present evidence at sentencing to show aggravation;

(5) Trial counsel did not adequately advise petitioner that the state would request consecutive sentences.

c. Upon petitioner's information and belief, the attorney that represented petitioner at his plea

hearing advised defendant to plead guilty even though petitioner continuously maintained his innocence.

d. Upon petitioner's information and belief, the attorney that represented petitioner at his plea hearing advised petitioner to plead guilty, even though petitioner did not have time to consider his decision, the consequences of the plea or to consult with counsel;

B. The cumulative effect of the above-designed flaws in the proceedings and errors and omissions by petitioner's trial counsel was a deprivation of petitioner's rights to effective and adequate counsel, due process of law, equal protection of the laws, and a fair hearing, constituting a substantial denial of his constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and his rights under the State of Oregon, Article I, sections 9, 11 and 20.

C. The conduct of trial counsel, as previously alleged, substantially affected the outcome of petitioner's case.

Second Claim for Relief (Sentencing)

A. Petitioner's sentences are illegal because the underlying sentencing proceedings resulted in a substantial denial of petitioner's rights under ORS 138.530, and he was denied due process of law and the effective and adequate assistance of trial counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and under Article I, section 11 of the Oregon Constitution as follows:

1. The attorney that represented petitioner at sentencing failed to adequately object and rebut the

hearsay presented to the court in the presentence investigation report as follows:

a. The attorney that represented petitioner at sentencing presented reports to the court containing the details of her own interviews with material witnesses, causing the sentencing court to exclude such information from its consideration.

b. The attorney that represented petitioner at sentencing failed to subpoena witnesses necessary to rebut information presented in the presentence investigation report.

2. The attorney that represented petitioner at sentencing failed to move for recusal of the sentencing judge, who had a bias or prejudice against petitioner.

B. The cumulative effect of the above-designated flaws in the proceedings and errors and omissions by petitioner's trial counsel was a deprivation of the petitioner's rights to effective and adequate counsel, due process of law, equal protection of the laws, and a fair hearing, constituting a substantial denial of his constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and his rights under the State of Oregon, Article I, sections 11 and 20.

C. The conduct of trial and sentencing counsel, as previously alleged, substantially affected the outcome of petitioner's sentencing hearing.

The court having considered the evidence and arguments of counsel, now makes the following:

FINDINGS OF FACT

1. Petitioner was indicted in Lane County Case No. 10-97-11098 with fifteen counts, as follows:

Count 1 - Coercion, Count 2 - Criminal Mischief in the Second Degree, Count 3 - Unauthorized Use of a Vehicle, Count 4 - Burglary in the First Degree, Count 5 - Sexual Abuse in the First Degree, Count 6 - Assault in the Fourth Degree, Count 7 - Rape in the First Degree, Count 8 - Sodomy in the First Degree, Count 9 - Sodomy in the First Degree, Count 10 - Coercion, Count 11 - Coercion, Count 12 - Sodomy in the First Degree, Count 13 - Sodomy in the First Degree, Count 14 - Sodomy in the First Degree, and Count 15 - Assault in the Fourth Degree. The charges stemmed from several domestic violence incidents between petitioner and his wife.

2. Due to the number of defense set-overs, the trial court set a date certain trial date of June 16, 1998. The trial court appointed petitioner his third attorney approximately one month before.

3. Prior to trial, petitioner accepted the State's plea offer and pled guilty to the following offenses: Count 1 - Coercion, Count 2 - Criminal Mischief in the Second Degree, Count 3 - Unauthorized Use of a Vehicle, Count 4 – Burglary in the First Degree, Count 5 - Sexual Abuse in the First Degree, Count 6 - Assault in the Fourth Degree, Count 7 - Rape in the First Degree, Count 8 - Sodomy in the First Degree, Count 9 - Sodomy in the First Degree, Count 10 - Coercion, and Count 15 - Assault in the Fourth Degree. Count 11 - Coercion, Count 12 - Sodomy in the First Degree, Count 13 - Sodomy in the First Degree, and Count 14 - Sodomy in the First Degree were dismissed as part of the plea bargain.

4. Subsequent to pleading guilty, petitioner, represented by a fourth attorney, filed a motion to

set aside his guilty plea. Petitioner asserted as the basis for the court to withdraw his guilty pleas (1) that the court failed to adequately advise him of the consequences of pleading guilty and (2) that he was not given adequate time to contemplate the consequences of pleading guilty. The trial court heard and ultimately denied petitioner's motion to withdraw his guilty pleas.

5. At petitioner's sentencing hearing, where he was represented by his fifth attorney, the prosecution argued that the court should impose upward departures and consecutive sentences totaling the maximum sentence allowable. One of the reasons the State requested the maximum sentence allowable is that, after petitioner's guilty plea but before sentencing, the victim received a phone call from a former Lane County inmate who indicated that petitioner had recruited him to scare the victim - or whatever it took - so that she would not appear at petitioner's sentencing. The former Lane County inmate also relayed to the victim that petitioner also wanted the prosecutor "taken out." Petitioner's sentencing attorney argued for the court to impose concurrent sentences totaling 100 months prison. The trial court sentenced petitioner: to serve 440 months prison and 36 months jail, for a total sentence of 476 months incarceration.

6. Prior to entering his guilty pleas, trial counsel met with petitioner. Trial counsel explained to petitioner the constitutional rights he would be waiving if he were to enter guilty pleas. Trial counsel also advised petitioner as to the maximum sentences he faced, the requirement to register as a sex offender, and that the State was seeking consecutive

sentences. Petitioner did not indicate to trial counsel that he did not understand trial counsel's advice.

7. Petitioner was present when the trial court recited the constitutional rights petitioner would waive by entering guilty pleas to the indictment.

8. The trial court inquired of petitioner whether he was present, listened, and understood the recital of constitutional rights petitioner would waive by entering guilty pleas to the indictment.

9. The trial court inquired of petitioner whether petitioner wished the court to repeat the waiver of constitutional rights petitioner would waive by entering guilty pleas to the indictment.

10. Petitioner indicated that he was present, listened to, and understood the recital of constitutional rights petitioner would waive by entering guilty pleas to the indictment. Petitioner indicated that he did not need the court to repeat the recital of constitutional rights petitioner would waive by entering guilty pleas to the indictment.

11. Prior to accepting petitioner's guilty pleas the trial court also asked petitioner whether he understood the nature of the plea agreement, whether he had adequate time to discuss the plea agreement with his attorney and whether he had sufficient information necessary to decide to plead guilty. The trial court also asked petitioner whether he understood that the State would seek consecutive sentences. To each question, the petitioner indicated that he understood the consequences of pleading guilty.

12. The trial court which sentenced petitioner afforded petitioner a fair and impartial hearing.

13. Sentencing counsel had no basis to file a motion to recuse the sentencing court.

12. This court finds petitioner to not be credible. This court finds the testimony of both trial counsel to be credible and adopts their statements of fact as findings of fact.

CONCLUSIONS OF LAW

1. Based on the findings of fact set forth above, in the underlying criminal proceedings resulting in petitioner's conviction, petitioner was not denied the right to assistance of counsel – both through his plea counsel and his sentencing counsel – as guaranteed by either the United States Constitution and as articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), or the Constitution of the State of Oregon.

2. Petitioner was adequately advised, both by his trial counsel and by the trial court, of the constitutional rights he would waive by pleading guilty.

3. Petitioner was adequately advised and understood the consequences of pleading guilty, including possible maximum sentences.

4. Petitioner had adequate time to consider the consequences of his decision to lead guilty.

5. Petitioner was adequately represented by plea counsel during his guilty pleas.

6. Petitioner was adequately represented by sentencing counsel during petitioner's sentencing hearing.

7. Petitioner's claims of trial court error are barred by *Palmer v., State of Oregon*, 318 Or 352

(1994), *Lerch v. Cupp*, 9 Or App 508 (1972), and *Hunter v. Maas*, 106 Or App 438 (1991).

8. Petitioner did not prove any of his claims by a preponderance of the evidence.

DATED this 6th day of January, 2004.

/s/ Jeffrey M. Wallace
HON. JEFFREY M. WALLACE
CIRCUIT COURT JUDGE

Submitted by: Susan G. Howe
Assistant Attorney General

Appendix E

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF LANE

No. 10-97-11098

STATE OF OREGON, Plaintiff,
v.
DAVID BOYLEN MANLEY, Defendant.

August 18, 1998

TRANSCRIPT OF PROCEEDINGS
(Motion to Withdraw Plea of Guilty)

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...him, did you enter into discussions with the District Attorney's Office with regard to negotiations in this case?

A Limited negotiations, yes.

Q And what do you mean by limited?

A When I first was appointed to represent Mr. Manley, I inquired whether -- what the status of negotiations were in the case and I was told that essentially the only offer was basically was around 15 years and that you had been told by his attorney -- I had spoke with you and you had been told by Mr. Manley's prior attorney that he rejected that offer. The only further negotiations we had in that case

were approximately I think I made a contact maybe a week or so before the trial setting and at which point the offer that you made was to have Mr. Manley plead to the charges which he subsequently pled to with an open sentence. I subsequently made one further inquiry of you. I think we talked about that a little bit at that time and I made one more inquiry of you on the 12th asking if you would agree to allow Mr. Manley to plead to essentially the same charges with a 12 year cap. I think I also asked you at that time whether or not you would agree to allow him to plead to an Alford plea and you said no.

Q Okay. And I said no with regard to both of

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those?

A Yes.

Q Both the 12 year cap and the Alford plea?

A Yes.

Q Did you relay that information back to Mr. Manley?

A I relayed that information back to him at the time. That conversation with you took place approximately 10:30 or 11:00 on the morning of (inaudible).

Q At that time did you indicate to me around 10:30 or 11:00 when I told you that I wouldn't accept your client's counter offer on the 12 year cap or an Alford plea to the charges, that your client would accept the previous offer that I had extended?

A Yes.

Q And did you have authority from the defendant to accept that offer?

A Yes.

Q And in other words, coming to me was just that if he was asking if I would come down a little bit from what I had previously offered?

A Correct.

Q Okay. And he had told you that if I had not come down, to go ahead and accept the offer of open

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sentence and plead to the charges?

A That was my understanding.

Q Okay. When did you next speak with him?

A At 35-day call, that same day prior.

Q And had you told him -- at what time did you communicate to him that I would not accept his counter offer but the original offer that had been extended ,would be the only --

A At that time.

Q And what was his reaction to that?

A He wasn't happy but he was prepared to go forward with the plea.

Q Specifically; I'd like to relate to you some conversations that he claims occurred in the courtroom at 35-day call where he entered his guilty plea. Did he ever tell you that he wanted to do an Alford plea because he believed he was innocent?

A (inaudible)

Q Did he ever make that statement at a prior time?

A Mr. Manley maintains his innocence, there's no question about that.

Q Okay. Did you explain to him that in entering a guilty plea, that he could not maintain his innocence?

A I explained to him he was giving up his right

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to trial and that he was giving up any right to challenge whether or not he was guilty or not.

Q And what was his understanding of that?

A I think he understood that.

Q Okay. Did he ever tell you -- at 35-day call you're -- quote, you're saying to me that I have to say that I'm guilty of these charges when I am not. I think that -- and your response being, I think that's in your best interest.

A I couldn't swear to that exact quote. I know we did have some discussion with regard to doing a straight up plea and the consequences of that. Whether it was earlier that day or at 35-day call, I'm not sure. I think I had indicated to him that at least in the -- for sentencing purposes, in the eyes of the Court, it might be better if he would plead straight up.

Q Okay. Was he still telling you, I'm an innocent man at that junction?

A No. We weren't discussing that.

Q Did you discuss with him at any time what the possible penalties were under the sentencing guidelines for the charges that he was going to be pleading to?

A Yes, I did.

Q And how did you explain those?

A I explained them both in terms of what I ...

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...because to me a 16 year sentence is a death sentence and I will risk a 50 year sentence in the hope I will receive less than 16. Do you remember telling her that?

A That's correct.

Q And it's true that at that point you were aware that the State was attempting to plea bargain with your former attorney, Mr. Ford?

A My understanding was that there was no effective plea bargain, that Mr. Ford expressed to me that you had expressed that my wife, then wife, wanted me to be in prison for at least until the children were adults for their own safety, which would be at least 16 years because one of my children had just turned two.

Q Okay.

A I was never given the impression that there was any kind of effective or progressive dialogue regarding a plea bargain in this case. In fact, when Mr. Friedman a week before my plea, Mr. Friedman first heard your plea, he told me that he laughed, that it's not a plea offer at all. And I did not agree to the plea on Friday morning. I didn't know I was

going to court that afternoon. I was not told that. And my understanding was that he was going to talk to you to see if you would find over on something and then he would talk to me and get my approval one way or the other.

Appendix F

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF UMATILLA

No. CV02-1097

DAVID BOYLEN MANLEY, Petitioner,
v.
JEAN HILL, Superintendent, Eastern Oregon Correctional Institution, Defendant.

[January 17, 2003]

AFFIDAVIT OF MARC P. FRIEDMAN

STATE OF OREGON)
)ss.
County of Lane)

I, Marc P. Friedman, being first duly sworn on oath, depose and say:

I am an attorney licensed to practice law in the State of Oregon, and in that capacity I represented David Boylen Manley in *State of Oregon v. David Boylen Manley*, Lane County Circuit Court Case No. 10-97-11098. I make this affidavit in response to petitioner's claim of inadequate assistance of trial counsel. I will respond to petitioner's allegations in the order they are listed in

the First Amended Petition for Post-Conviction Relief.

1. I have reviewed my file in *State v. David Boylen Manley*, Lane County Circuit Court Case No. 10-97-11098. I was Mr. Manley's trial attorney, and appeared with him when he changed his plea. Subsequently, I withdrew as counsel when Mr. Manley advised me that he wished to withdraw his change of plea. I will limit my response to those allegations contained within the First Claim for Relief which bear on my representation of Mr. Manley.

1 a-e

2. Mr. Manley was advised of the plea negotiations with the State prior to his change of plea. Plea negotiations were discussed off and on well before the trial date. The final terms of a plea offer were presented to Mr. Manley on June 10, 1998. Mr. Manley was advised that he could be subject to the Buckholtz rule, as well as an upward departure. Mr. Manley was also told that as charged if convicted he could face 429 months incarceration without departure.

3. Mr. Manley was unsure. Final trial preparations were made. As counsel I expressed my concerns about the case to Mr. Manley. On the morning of June 12, 1998, the investigator and I met with Mr. Manley at the jail.

4. Mr. Manley was advised that the 12th was the deadline set by the State for Mr. Manley to accept or reject a plea. Mr. Manley indicated that he would take the plea, but wanted additional assurances from the State as to the length of his sentence. Those were not forthcoming. I did not see

or speak with Mr. Manley again until court in the afternoon on the 12th. To the best of my knowledge and recollection we had discussed on previous occasions the potential for consecutive sentences and aggravating factors. I do not recall if I ever specifically discussed with Mr. Manley the PSI or sex offender evaluation. It is, however, something which I routinely address with clients facing sex offense charges.

5. I was not Mr. Manley's counsel during the time period referred to here. This was prior to my appointment.

4.a-d

6. Mr. Manley's case was fully investigated. I requested and received funds for a private investigator. All available leads and information bearing on Mr. Manley's case including issues of bias and motive, credibility and truthfulness were explored.

7. As counsel I advised Mr. Manley of his rights, and of his right not to plead guilty. Mr. Manley was not pressured or coerced by counsel to plead. Mr. Manley was specifically told that as counsel I believed he faced greater exposure if he lost at trial, and that there was a reasonable basis to believe that he might get some leniency from the court if he plead.

8. The plea was premised upon counsel's belief that Mr. Manley could receive some consideration in his sentence if he plead. Counsel through the investigator had had contact with the victim, Mr. Manley's wife, which indicated she was not/would not ask the DA or the court to impose a maximum sentence.

/s/ Marc P. Friedman
Marc P. Friedman
Attorney at Law

SUBSCRIBED AND SWORN to before me this 17th day of January, 2003.

/s/ Carolyn R. Miller
Notary Public for Oregon
My Commission Expires: June 16, 2006

Appendix G

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF UMATILLA

No. CV02 1097

DAVID BOYLEN MANLEY, Petitioner,
v.
ROBERT SCHEIDLER, Superintendent, Two Rivers Correctional Institution, Defendant.

[January 17, 2003]

DEPOSITION OF MARC P. FRIEDMAN
Perpetuation of Testimony

...stipulated facts trial or an Alford plea or anything of that sort.

Q Did you have concerns about Mr. Manley entering a guilty plea when he had before that time claimed to not have committed the crime?

MS. HOWE: Mr. Kauffman, could you please repeat that.

MR. KAUFFMAN: I asked: Did you have concerns about Mr. Manley entering a guilty plea when he had before that time asserted that he had not committed the crime?

A I don't know that "concerns" is the right word. I mean, I was aware that had been Mr. Manley's position prior to that time.

And I certainly have had that occur with other clients that maintained their -- you know, their innocence, and that's not uncommon.

And it is simply a part of the plea bargain process. My concerns, if anything, were that, you know, he wasn't getting the greatest deal in the world, but he was risking a heck of a lot if he went to trial.

BY MR. KAUFFMAN:

Q Is it typical in -- or is there a ...